CHAPTER 2.
Legal Framework

U.S. Supreme Court decisions, other federal court rulings and USDOT guidance help to form the legal framework for this disparity study. Appendix A provides in-depth analysis of relevant legal decisions.

Federal regulations (49 CFR Part 26) provide the requirements as to how state and local governments receiving USDOT funds must implement the Federal DBE Program.[1] GDOT also administers USDOT funds that flow through the Department to cities, counties and local transportation agencies in Georgia. USDOT requires that the Federal DBE Program also be applied to these contracts.

To further explain the context for this disparity study, it is useful to review:

A. Race-conscious and neutral measures of the Federal DBE Program;

B. Race-conscious and neutral measures of state and local programs; and

C. Legal standards that race-conscious programs must satisfy.

A. Race-conscious and Neutral Measures of the Federal DBE Program

Rules governing state and local government implementation of the Federal DBE Program require that a government agency meet the maximum feasible portion of its overall goal for DBE participation through race-neutral means (49 CFR Section 26.51). Race-neutral measures include removing barriers to participation of firms in general or promoting use of small or emerging businesses.

If a state or local government can meet its overall annual DBE goal solely through race-neutral means, it must not use race-conscious measures. If it cannot, setting DBE contract goals is a permissible race-conscious measure under the Federal DBE Program. Because DBE contract goals consider the utilization of firms based in part on their race or gender ownership, such programs must satisfy certain legal and regulatory standards in order to be valid, as discussed below.

[1] http://www.fhwa.dot.gov/HEP/49cfr26.htm.

Given this context, general approaches that state and local governments receiving USDOT funds use to implement the Federal DBE Program include:

1. **Applying race-conscious measures such as DBE contract goals, as well as neutral measures, with all certified DBEs eligible for race- and gender-conscious measures.** Many states use both race-neutral and race-conscious measures when implementing the Federal DBE Program. Their race-conscious measures include applying DBE contract goals under the Federal DBE Program.

   GDOT currently implements the Federal DBE Program in this fashion. On FHWA-funded contracts, GDOT specifies a goal for DBE participation in the contract (contract goals are expressed as a percentage of the contract dollars that might go to DBEs). Prime contractors bidding on the contract must include a level of participation of DBEs that would meet the goal or show good faith efforts to do so. GDOT sets DBE goals for FHWA-funded construction and FHWA-funded engineering contracts.

   A number of non-minority contractors and other groups have filed lawsuits challenging the constitutionality of the Federal DBE Program, or the constitutionality of the state and local governments' implementation of the Program, or both. For example, contractors have filed lawsuits against state departments of transportation implementing the Federal DBE Program in California, Illinois, Minnesota, Nebraska and Washington. The Federal DBE Program and its implementation by a state were successfully defended in California, Illinois, Minnesota and Nebraska, but not in Washington. (The legal standards applied in these and other cases are explained later in Chapter 2 and in Appendix A of this report.)

2. **Applying more restrictive race-conscious measures only in extreme circumstances (combined with neutral programs).** The Federal DBE Program provides that a recipient may not set aside contracts for DBEs, except that, in limited and extreme circumstances, a recipient may use set-asides when no other method could be reasonably expected to redress egregious instances of discrimination. (49 CFR Section 26.43). Quotas for DBE participation are prohibited under the Program.

3. **Applying race-conscious measures, but limit application to a subset of DBEs.** Some state DOTs limit participation in the race- and gender-conscious measures of the Federal DBE Program to certain racial, ethnic or gender groups based upon the evidence in a state for those groups. For example, the Colorado Department of Transportation (CDOT) received a waiver from USDOT that has allowed CDOT to set contract goals for "Underutilized DBEs" (UDBEs), which might not necessarily include all DBE groups. CDOT has counted the participation of all DBEs toward CDOT's overall annual goal, but only UDBEs can be used to meet individual contract goals. Over a number of years, CDOT has tracked utilization of minority- and women-owned firms by group to identify the racial, ethnic and gender groups that are "underutilized" and therefore eligible to be UDBEs. (At the time of this report, all DBEs were included as eligible for meeting DBE contract goals.) The California Department of Transportation has operated a similar subcontracting goals program for UDBEs.

4. **Operate an entirely race-neutral program.** Some state DOTs have implemented the Federal DBE Program without DBE contract goals or other race-conscious measures. For example, the Florida Department of Transportation implements the Federal DBE Program by using entirely race-neutral means.

B. Race- and Gender-Conscious State and Local Programs

In addition to USDOT-funded contracts, GDOT and other state DOTs award transportation contracts that are solely funded through state and local sources. The Federal DBE Program does not apply to those contracts.

GDOT does not currently apply any race-conscious programs to its non-federally-funded contracts. However, GDOT had a program for state-funded contracts for several years in the 1990s that was similar to the Federal DBE Program. The Georgia Attorney General prepared a letter dated August 12, 1996 indicating that GDOT had not met the legal standards for race- or gender-conscious programs on its state-funded contracts. The Attorney General recommended that GDOT suspend its state program "until (1) information is gathered by the Department which shows with particularity that there has been discrimination in the process of contracting for DOT projects or (2) the program is restructured to eliminate the group classification components." GDOT chose to no longer operate a race- or gender-conscious program for its state-funded contracts.

Some state and local governments continue to operate programs for their non-federally-funded contracts that have elements similar to DBE contract goals. For example, the Texas Department of Transportation operates a Historically Underutilized Business Program that includes contract goals on certain state-funded projects. The North Carolina Department of Transportation has had a Minority Business and Women Business Enterprise Program that mirrors the Federal DBE Program.

Several local governments in Georgia have also operated minority business enterprise programs. For example, the City of Atlanta operates an Equal Business Opportunity Program and the City of Savannah has a Minority and Women Business Enterprise Program. A number of local government programs in Georgia have been challenged in court, including those operated by the City of Atlanta, the City of Augusta, Fulton County and the DeKalb County School District. Courts considering the programs of the City of Augusta, Fulton County and DeKalb County School District have found the minority business programs to be unconstitutional.

The legal standards that race- and gender-conscious programs must meet are discussed below.

C. Legal Standards that Race-Conscious Programs Must Satisfy

The U.S. Supreme Court has established that government programs with race-conscious measures must meet the "strict scrutiny" standard of constitutional review. The two key U.S. Supreme Court cases in this area are:

- The 1989 decision in *City of Richmond v. J.A. Croson Company*, which established the strict scrutiny standard of review for race-conscious programs adopted by state and local governments;[2] and

- The 2005 decision in *Adarand Constructors, Inc. v. Peña*, which established the same standard of review for federal race-conscious programs.[3]

As described in detail in Appendix A, the strict scrutiny standard is extremely difficult for a government entity to meet — it presents the highest threshold for evaluating the legality of race-conscious programs short of prohibiting them altogether. Under the strict scrutiny standard, a governmental entity must:

- Have a *compelling governmental interest* in remedying specific past identified discrimination or its present effects; and

- Establish that any program adopted is *narrowly tailored* to achieve the goal of remedying the identified discrimination. There are a number of factors a court considers when determining whether a program is narrowly tailored (see Appendix A).

A government agency must meet both components of the strict scrutiny standard; a program that fails either one is unconstitutional.

Examples of race-conscious programs that have not satisfied the strict scrutiny standard. As discussed in Appendix A, many state and local race-conscious programs have been challenged in court and found to be unconstitutional.

The *Thompson Building Wrecking Co. v. Augusta, Georgia*[4] and the *Virdi v. DeKalb County School District*[5] cases in Georgia are examples of local government programs that did not meet the strict scrutiny standard by failing to be narrowly tailored. Appendix A examines these cases, as well as examples where courts found that the state or local agency did not meet the strict scrutiny standard because it did not sufficiently show a compelling governmental interest for its program.

---

[2] *City of Richmond v. J.A. Croson Company*, 488 U.S. 469 (1989).

[3] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

[4] *Thompson Building Wrecking Co. v. Augusta, Georgia*, No. 1:07 CV019, 2007 WL 926153 (S. D. Ga. Mar. 14, 2007).

[5] *Virdi v. DeKalb County School District*, 135 Fed. Appx. 262, 2005 WL 138942 (11th Cir. 2005) (unpublished opinion).

Examples of race-conscious programs that have satisfied the strict scrutiny standard. The Federal DBE Program, on its face, has been held to be constitutional in legal challenges to date (see discussion in Appendix A of *Northern Contracting, Inc. v. Illinois DOT*,[6] *Sherbrooke Turf, Inc. v. Minn DOT and Gross Seed v. Nebraska Department of Roads*,[7] *Western States Paving Co. v. Washington State DOT*[8] and *Adarand Constructors, Inc. v. Slater*[9]). Some of the key court decisions are discussed below.

Seventh Circuit Court of Appeals decision in *Northern Contracting*. In the *Northern Contracting* decision (2007), the Seventh Circuit Court of Appeals cited its earlier precedent in *Milwaukee County Pavers v. Fielder* to hold "that a state is insulated from [a narrow tailoring] constitutional attack, absent a showing that the state exceeded its federal authority. IDOT [Illinois DOT] here is acting as an instrument of federal policy and Northern Contracting … cannot collaterally attack the federal regulations through a challenge to IDOT's program."[10]

The Seventh Circuit Court of Appeals distinguished both the Ninth Circuit Court of Appeals decision in *Western States Paving* and the Eighth Circuit Court of Appeals decision in *Sherbrooke Turf*, relating to an as-applied narrow tailoring analysis:

- The Seventh Circuit held that the IDOT's application of a federally mandated program is limited to the question of whether the state exceeded its grant of federal authority under the Federal DBE Program.[11]

- The Seventh Circuit analyzed IDOT's compliance with the federal regulations regarding calculation of the availability of DBEs, adjustment of its goal based on local market conditions and its use of race-neutral methods set forth in the federal regulations.[12] The court held that Northern Contracting failed to demonstrate that IDOT did not satisfy compliance with the federal regulations (49 CFR Part 26).[13]

Accordingly, the Seventh Circuit Court of Appeals affirmed the district court's decision upholding the validity of IDOT's DBE program. (See the discussion of the *Northern Contracting* decision in Appendix A.)

---

[6] 473 F.3d 715 (7th Cir. 2007).

[7] 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

[8] *Western States Paving Co. v. Washington State DOT*, 407 F.3d 983 (9th Cir. 2005), *cert. denied*, 546 U.S. 1170 (2006).

[9] *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) *cert. granted then dismissed as improvidently granted sub nom. Adarand Constructors, Inc. v. Mineta*, 532 U.S. 941, 534 U.S. 103 (2001).

[10] 473 F.3d at 722

[11] *Id.* at 722.

[12] *Id.* at 723-24.

[13] *Id.*

Ninth Circuit Court of Appeals decision in *Western States Paving*. The constitutionality of the Federal DBE Program was also upheld by the Ninth Circuit Court of Appeals in *Western States Paving*; however, the Ninth Circuit found that the Washington State DOT failed to show its implementation of the Federal DBE Program to be narrowly tailored. Since that 2005 ruling, state DOTs in Ninth Circuit states operated entirely race-neutral programs until studies could be completed that analyzed whether there was evidence of discrimination in the local transportation contracting industry, and if so, whether any race-conscious measures set forth in the Federal DBE Program were appropriate in those states (and if so, for which racial, ethnic and gender groups).[14] The first court to examine a state implementation of the Federal DBE Program in the Ninth Circuit after *Western States Paving* found that the state's implementation of the Federal DBE Program to be constitutional (see *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*[15]).

Relevant cases within the Eleventh Circuit. Because Georgia is located within the jurisdiction of the Eleventh Circuit Court of Appeals, neither the Seventh Circuit nor the Ninth Circuit cases are necessarily controlling or binding on GDOT. They are instructive, however, as to legally defensible implementation of the Federal DBE Program. The one case within the Eleventh Circuit to consider this issue held that the Seventh Circuit ruling should apply.

- The plaintiff in *South Florida Chapter of the Associated General Contractors v. Broward County, Florida* argued that the Ninth Circuit's ruling in *Western State Paving* should govern the court's consideration of the implementation of the Federal DBE Program within the Eleventh Circuit. [16]

- The defendant, Broward County, pointed to case law from the Seventh Circuit to contend that, as a recipient of federal funds implementing the Federal DBE Program, all that is required of the County is to comply with the federal regulations.

- The district court found that there was no case law on point in the Eleventh Circuit. [17] The district court concluded that it would apply the case law as set out in the Seventh Circuit and concurring circuits, and that the trial in the case would be conducted solely for the purpose of establishing whether or not the County has complied fully with the federal regulations in implementing its DBE program.[18]

- Subsequently, there was a Stipulation of Dismissal filed by all parties in the district court, and an Order of Dismissal was filed without a trial of the case in November 2008.

---

[14] Disparity studies have been completed or are underway for state DOTs in each state within the Ninth Circuit — Alaska, Hawaii, Washington, Idaho, Montana, Oregon, California, Nevada and Arizona — as well as many local transit agencies and airports in those states.

[15] *Associated General Contractors of America, San Diego Chapter, Inc. v. California Department of Transportation, et al.*, U.S.D.C., E.D.Cal, Civil Action No. S-09-1622, Slip Opinion (E.D. Cal. April 20, 2011). The decision of the district court has been appealed to the Ninth Circuit Court of Appeals

[16] *South Florida Chapter of the Associated General Contractors v. Broward County*, *Florida,* 544 F. Supp. 2d 1336 (S.D. Fla. 2008).

[17] *Id*. at 1338.

[18] *Id*. at 1341.

Appendix A reviews this case in considerable detail.

Guidance from decisions that have upheld state and local programs. In addition to the Federal DBE Program, some state and local government minority-business programs have been found to meet the strict scrutiny standard. Appendix A discusses the successful defense of state and local race-conscious programs, including *Concrete Works of Colorado v. City and County of Denver*[19] and (upheld in part as to certain groups) *H.B. Rowe Company, Inc. v. W. Lyndo Tippett, North Carolina Department of Transportation, et al.*[20]

Appendix A of this report as well as USDOT Guidance[21] provide further analysis of these issues and instruction regarding the legal issues in a state or local government's implementation of the Federal DBE Program.

[19] *Concrete Works of Colorado v. City and County of Denver*, 321 F.3d 950 (10th Cir. 2003), *cert. denied*, 540 U.S. 1027 (2003).

[20] *H.B. Rowe Company., Inc. v. W. Lyndo Tippett, North Carolina Department of Transportation, et al*; 589 F. Supp. 2d 587 (E.D.N.C. 2008), *appeal pending* in the Fourth Circuit Court of Appeals.

[21] http://www.osdbu.dot.gov/DBEProgram/dbeqna.cfm.